Supreme Court, U.S.
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No.

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IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1994

LAWRENCE FRIEDMAN,

Petitioner,

vs.

ARESENIA TOLENTINO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the application of the Fair Debt Collection Practices Act ("FDCPA") to a communication with a debtor by an attorney engaged in litigation over a debt. The Seventh Circuit Court of Appeals held that §1692e(11) of the FDCPA requires an attorney to make certain disclosures, (i.e., that he is attempting to collect a debt and that any information obtained will be used for that purpose) on every communication with a debtor even after the debtor was sent prior communications containing the precise disclosures and even though litigation with the debtor had commenced. This case presents the following questions:

1) Whether the §1692e(11) disclosures must be placed on follow-up communications sent to debtors by an attorney where the attorney sent pre-litigation communications containing the precise statutory language.

2) Whether the §1692e(11) disclosures must be present in all communications sent to debtors by attorneys after litigation against the debtor has been instituted by the attorney.

3) Whether the communication stating that "this office represents the creditors interests and cannot represent your interests" complies with the disclosure requirements of §1692e(11).

4) Whether the communication violated §1692e(9), §1692e(10) or §1692e(13).

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is published at Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995)(a copy of the opinion is attached hereto as Appendix A).

The opinion and judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which was affirmed in part by the Seventh Circuit, is published at Tolentino v. Friedman, 833 F.Supp. 697 (N.D. Ill. 1993)(Judge Charles R. Norgle, Sr.)(a copy of the opinion is attached hereto as Appendix B).

JURISDICTION

The opinion of the U.S. Court of Appeals was entered on January 31, 1995. No petition for rehearing was filed. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692e(9), (10), (11) and (13), provide as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) Except as otherwise provided for communications to acquire location information under section 804, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

* * *

(13) The false representation or implication that documents are legal process.

STATEMENT OF THE CASE

Petitioner is a lawyer whose practice includes the collection of consumer debts. As part of his law practice, Petitioner sends debtors letters tracking the language of

§1692e(11) of the FDCPA prior to filing lawsuits to collect unpaid debts. 833 F.Supp. at 698. Specifically, the pre-litigation letter states, *inter alia*: "This letter is an attempt to collect a debt and any information obtained may be used for that purpose." (A copy of this letter is attached hereto as Appendix C) This was the case with Respondent, who was sent a pre-litigation letter containing the language quoted above. 833 F.Supp. at 698. After filing a lawsuit against a debtor, Petitioner sends a document entitled "Important Notice" (the "Notice") to the debtor along with a copy of the summons and complaint. (A copy of the Notice is attached hereto as Appendix D) This was also the case with Respondent. Ibid; (a copy of the complaint is attached hereto as Appendix E). The Notice specifically identifies the Petitioner as its source and states that "this office only represents the creditor and we cannot represent your interests in this matter."

After receiving these communications, Respondent sued Petitioner for alleged violations of the FDCPA. She claimed that the Notice did not comply with §1692e(11) because it did not contain the exact language. Respondent also alleged that the Notice violated §1692e(9), §1692e(10) and §1692e(13). The District Court had jurisdiction pursuant to 28 U.S.C. §1331, as federal questions were presented in interpreting the provisions of the FDCPA. After the parties presented cross motions for summary judgment, the District Court granted Respondent's motion and denied Petitioner's motion. 833 F.Supp. at 702. Upon Petitioner's stipulation that he was a "debt collector" under the FDCPA, the District Court entered a final judgment in favor of Respondent and awarded Respondent certain attorneys' fees and costs.

The Seventh Circuit affirmed, in part.[1] Specifically, the court below found that the FDCPA literally required that the §1692e(11) disclosures be placed on every communication with a debtor: 1) whether or not the communication was a follow-up to prior communications containing the disclosures, and 2) whether or not the communication was sent by an attorney during the course of litigation instituted to collect the debt.

With respect to the allegations as to §1692e(9), §1692e(10) and §1692e(13), the Seventh Circuit declined to rule, stating:

> While we have serious reservations as to whether summary judgment is appropriate as to subsections (9), (10), and (13), because of triable issues that are presented there, we need not address those issues, since we are affirming summary judgment based on subsection (11), and, in the circumstances of this appeal, it does not matter whether the same notice contained additional violations.

Petitioner now seeks review by this Court as the only means to resolve conflicts among the circuit courts of appeal regarding the application of §1692e(11): 1) to follow-up communications after prior disclosures which track the

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[1] The partial reversal concerned the issue of Respondent's attorneys fees. The Seventh Circuit held that it was error to denote a special lower hourly rate for attorneys' fees in FDCPA cases. The Seventh Circuit then remanded for further proceedings on this issue and ordered the District Court to take up the question of attorneys' fees on appeal.

language of §1692e(11), and 2) to communications sent by an attorney during the course of litigation. In addition, Petitioner seeks review of whether the Notice complies with §1692e(11) by naming Petitioner as its source and informing the debtor that "this office only represents the creditor and we cannot represent your interests in this matter." Finally, if the Court finds no violation of §1692e(11), it must also review the contentions as to whether the Notice violates §1692e(9), §1692e(10) and §1692e(13).

REASONS FOR GRANTING THE WRIT

This case presents compelling questions of federal law regarding the interpretation of the FDCPA as it applies to lawyers. The case, which involves one question over which circuit courts of appeal have split and three additional questions of federal law that should be settled by this Court, presents the first opportunity for the Court to clarify or expand its recent decision on the FDCPA. First, the circuit courts of appeal are split over whether a debt collector must place the §1692e(11) disclosures on follow-up communications. Compare Pressley v. Capital Credit Collection Service, Inc., 760 F.2d 922 (9th Cir. 1985) with Pipiles v. Credit Bureau of Lockport, 886 F.2d 22 (2nd Cir. 1989); Dutton v. Wolpoff & Abramson, 5F.3d 642 (3rd Cir. 1993); Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992) and Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1993). Second, though this Court recently determined that attorneys are not *per se* exempt from all aspects of the FDCPA, the Court left open the question of the extent to which the FDCPA's "conduct-regulating provisions" apply during the course of litigation. Heintz v. Jenkins, ___ U.S. ___, 1995 U.S. LEXIS 2840, 63 U.S.L.W. 4266 (April 18, 1995). This case presents the specific question of whether

communications sent during the course of litigation must contain the §1692e(11) disclosures. Third, both courts below implicitly assumed that §1692e(11) requires that all communications state the precise words "this is an effort to collect a debt and all information will be used for that purpose." However, Petitioner's Notice, sent with a copy of the summons and complaint, specifically states that his office "represents the creditors interests and cannot represent your interests." This statement complies with the intent and spirit of §1692e(11) especially where, as here, it was sent together with a copy of the complaint. Finally, if the Court finds no §1692e(11) violation, it must decide whether §1692e(9), §1692e(10) or §1692e(13) were violated.

Though this Court recently decided that a lawyer may be a "debt collector" and subject to the FDCPA even when he is engaged in litigation activities, the Court's decision in Heintz v. Jenkins does not resolve the issues presented in this case. In Heintz, this Court reviewed a F.R.Civ.P. 12(b)(6) dismissal that was reversed by the Seventh Circuit Court of Appeals. In that case, the district court granted a dismissal because, in its view, attorneys engaged in litigation are exempt from the FDCPA. The Seventh Circuit reversed, finding that attorneys engaged in litigation to collect consumer debts are subject to the FDCPA. This Court affirmed. Though attorneys engaged in litigation enjoy no general exemption from the FDCPA, it remains unclear to what extent any "conduct-regulating provision" of the FDCPA applies to attorneys engaged in litigation. Therefore, the Court must still address the issues of: 1) whether follow-up communications require the §1692e(11) disclosures or whether such repetitive disclosures can be viewed as harassing; 2) whether communications during litigation implicitly convey the §1692e(11) disclosures and, therefore, need not explicitly do so; and 3) whether or not the Notice

complies with §1692(e)(11) despite the absence of the precise statutory language from the Notice.

A. THE CIRCUITS DISAGREE AS TO THE NEED FOR §1692e(11)DISCLOSURES IN FOLLOW UP COMMUNICATIONS.

In Heintz v. Jenkins, the Court was not faced with, and did not address, the inter-circuit conflict over whether the §1692e(11) disclosures must be placed in follow-up communications sent after the commencement of litigation where the debtor has received prior communications containing the precise statutory language. That question is squarely presented by this appeal.

It was undisputed below that prior to commencing litigation the Petitioner sent the Respondent a letter declaring, "this letter is an attempt to collect a debt and any information obtained may be used for that purpose." 833 F.Supp. at 698. After receiving no response to the letter, Petitioner filed suit and mailed his Notice with a copy of the summons and complaint. The Notice, instead of exactly reciting the §1692e(11) language, stated that "this office represents the creditors interests and cannot represent your interests." 833 F.Supp. at 698-9. Of course, the Respondent also had the benefit of the pre-litigation letter containing the §1692e(11) disclosures and the accompanying summons and complaint.

The first circuit court of appeals to address the issue of follow up communications held that the §1692e(11) disclosures were not required in such communications. Pressley v. Capital Credit and Collection Service, Inc., 760 F.2d 922 (9th Cir. 1985). In Pressley, a debt collection agency sent a notice to the debtor that recited the amount of

the debt, stated that the debtor had failed to contact this office "as requested", and requested payment within seven days or further action would be taken. 760 F.2d at 923. The debtor sued and alleged a violation of §1692e(11). The Pressley court found no violation.

The Pressley court analyzed Congressional intent as follows:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has lead to absurd or futile results, however, this Court looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there can certainly be no "rule of law" which forbids its use, however clear the words may appear on 'superficial examination.' United States v. American Trucking Associations, 310 U.S. 534, 543-4, 60 S.Ct. 1059, 1063-4, 84 L.Ed. 1345 (1940).

Under this approach, the Pressley court took notice that the purpose of the FDCPA is to eliminate abusive debt collection practices without disadvantaging those who refrain from using such practices. 15 U.S.C. §1692(e). It also took note of the Federal Trade Commission's enforcement position as evidenced by an informal advisory opinion which stated:

> where the debtor has already received proper notification of the debt...or has been negotiating with the debt collector over the terms of repayment, ...no purpose is served by requiring that every subsequent communication with that debtor contain these disclosures. In fact, there are some circumstances where the disclosures could become increasingly intimidating, contrary to the overall intent of the Act. Letter dated June 10, 1983 from Bryce L. Harlow, Director Office of Congressional Relations FTC, to Representative Robert L. Smith, quoted at 760 F.2d 925.

Since it was clear from the Notice that the collector was attempting to collect a debt and that payment had been requested in a prior communication, no useful purpose would be served by a mere formal repetition of the warnings in a follow up notice. 760 F.2d at 926.

The FTC Staff Commentary is in agreement. It states: "When a debt collector contacts a consumer and clearly discloses that he is seeking payment of a debt, he need not state that all information will be used to collect a debt, since that would be apparent to the consumer. The debt collector need not repeat the required disclosure in subsequent

contacts." (emphasis added) 53 Fed. Reg. 50,097, 50,107 (Dec. 13, 1988)

Even a consumer advocacy group, the National Consumer Law Center, agreed that the intent of §1692e(11) was rather limited. It stated that the §1692e(11) notice was originally designed to address "deceptive skip tracing letters and other messages where the debt collection purpose may not be mentioned or be apparent." Fair Debt Collection, §4.6.1, p. 96 (2nd ed. 1991). Since Petitioner had filed suit against Respondent to collect the debt, and enclosed a copy of the summons and complaint with the Notice, his purpose was apparent and §1692e(11) was clearly not designed to reach the Notice.

Nevertheless, the Second, Third and Fourth Circuit Courts of Appeal have held in somewhat different factual circumstances, and the Sixth Circuit has indicated in *dicta*, that it would also not follow Pressley. Pipiles v. Credit Bureau of Lockport, 886 F.2d 22, 26-7 (2nd Cir. 1989); Dutton v. Wolpoff & Abramson, 5 F.3d 649 (3rd Cir. 1993) (no indication that letter was follow-up); Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992); Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1993) (initial communication to collect a judgment).

Splits among the circuits are not resolved by majority vote of the circuits. Nor was this issue addressed by Heintz v. Jenkins, a case that did not concern §1692e(11). Section 1692e(11) should be given a uniform rational interpretation in order to fulfill Congress' intent of regulating debt collectors nationwide. The Pressley approach properly effectuates the Congressional intent.

B. THE §1692e(11) DISCLOSURES ARE IMPLICIT IN ALL LITIGATION COMMUNICATIONS AND NEED NOT BE EXPLICITLY STATED.

In Heintz v. Jenkins, this Court recognized that court-related documents contain certain inherent implicit warnings to debtors. Specifically, the Court discussed the apparent anomaly of §1692c(c). That Section requires a debt collector to cease communications with a debtor after a debtor notifies the debt collector that it disputes the debt or that the debtor wishes further communications to cease. The debt collector in Heintz argued that this could cause ordinary debt collection lawsuits to grind to a halt, an absurd result which could not have been intended by Congress.

In reasoning that such a reading was unnecessary, this Court stated:

> Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditor's judicial remedies. (emphasis added)

Communications, particularly communications sent with a copy of the complaint filed during the collection litigation, carry an implicit warning that they are sent to collect a debt and information gathered will be used for that

purpose. Quite simply, there is no other purpose for a collection lawsuit than to collect a debt.

The Seventh Circuit disagreed. However, its holding embodies an overly literal reading of §1692e(11) which produces the absurdity of requiring the §1692e(11) disclosures on all litigation documents. Under the Seventh Circuit approach, for example, the §1692e(11) disclosures must be placed on:

* correspondence to effectuate settlement
*correspondence between counsel
*complaints
*summonses
*discovery requests
*discovery responses
*deposition notices
*court orders
*offers of settlement
*judgments
*motions
*post judgment enforcement documents

This absurd result cannot have been intended by Congress. Obviously, given the manner in which the attorney exemption was repealed, some ambiguity in the statute was inevitable. However, this type of intrusion into the practice of law was clearly not intended. Therefore, the Court should grant certiorari to provide guidance to debt collection practitioners on the extent to which litigation communications must comply with the FDCPA.

C. THERE IS A DISPUTE AS TO WHETHER AS MATTER OF LAW PETITIONER'S NOTICE COMPLIED WITH §1692e(11).

It is undisputed that the Notice identifies Petitioner as its source and states "this office represents the creditor and cannot represent your interests." The Notice also asks the debtor to contact Petitioner's office to discuss repayment of the debt. Admittedly, however, the Notice does not specifically and explicitly state that it is an effort to collect a debt and all information obtained will be used for that purpose. Nonetheless, the Notice satisfies the disclosure requirements of §1692e(11). When sent along with the complaint and summons, it is obvious to even the unsophisticated consumer that Petitioner was attempting to collect a debt. Indeed, the complaint that was sent to the debtor is nothing but an effort to collect a debt. The court in Pipiles v. Credit Bureau of Lockport, 886 F.2d 22, 26 (2nd Cir. 1989) held that a collection letter need not state in so many words that it is an attempt to collect a debt where that purpose is apparent from the face of the letter. However, the Pipiles court, in a somewhat contradictory fashion, held that a letter must contain a warning that all information obtained will be used for that purpose. 886 F.2d at 26.

Petitioner contends that the holding in Pipiles misconstrues the purpose of §1692e(11), which is to protect debtors from misleading and deceptive attempts to obtain information they would not otherwise give. By contrast, Petitioner's Notice is straight-forward and clear.[2]

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[2]Given the fact that the Notice was sent with the complaint and clearly advised that Petitioner represented the creditor and could not represent the debtor, Petitioner should

Though this question was fairly raised by the briefs below, the Seventh Circuit did not discuss this issue in its ruling. The Court should accept this case to clarify the meaning of §1692e(11) and Congress' intent to prevent abusive and deceptive attempts to secure information, not efforts to settle litigation, which are clearly sent by an opposing attorney.

D. THIS COURT SHOULD ALSO REVIEW THE §1692e(9), (10) AND (13) CONTENTIONS.

§1692e(9), (10) and (13) provide as follows:

> (9) The use or distribution of any written communication which stimulates or is falsely represented to be a document authorized, issued or approved by any court ... or which creates a false impression as to its source, authorization, or approval.
>
> (10) The use of any false representation or deceptive means to collect any debt or to obtain information concerning a consumer.
>
> * * *

---

be entitled to rely upon the *bona fide* error defense. Pursuant to §1692k(c) of the FDCPA, a debt collector is not liable if he "shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." Here, Petitioner hired counsel to draft the Notice to comply with applicable laws.

> (13) The false representation or implication that documents are legal process.

With respect to the allegations as to §1692e(9), §1692e(10) and §1692e(13), the Seventh Circuit declined to rule, stating:

> While we have serious reservations as to whether summary judgment is appropriate as to subsections (9), (10), and (13), because of triable issues that are presented there, we need not address those issues, since we are affirming summary judgment based on subsection (11), and, in the circumstances of this appeal, it does not matter whether the same notice contained additional violations.

Therefore, if the Court rules in favor of Petitioner on the §1692e(11) issues, it must necessarily rule on the §1692e(9), §1692e(10) and §1692e(13) issues. In the alternative, the Court should remand this matter to the Seventh Circuit for further proceedings.

In this respect, it is important that the Notice specifically identifies Petitioner as its source and states that he represents the creditor, not the debtor. The Notice also references the lawsuit which Petitioner filed against the debtor, a copy of which is enclosed for reference. Petitioner sent the Notice in an envelope bearing his return address. Moreover, the tenor of the Notice is suggestive, not mandatory. The Notice does not require or demand anything. It simply asks the debtor to contact Petitioner to discuss repayment.

Obviously, the Notice cannot be mistaken for court process or as a court issued document. Nor is the Notice

deceptive or misleading. Given Petitioner's explicit identification of himself as the source of the Notice and his clear statement that he represents the creditor, even an unsophisticated consumer could not be mislead by the Notice. In fact, there is no testimony in the record that anyone was mislead. Though the Seventh Circuit decided not to address these issues because only one violation establishes liability, a reversal on the §1692e(11) violation necessitates a decision on these issues either by this Court or the Seventh Circuit.

CONCLUSION

For the foregoing reasons, Petitioner Lawrence Friedman respectfully requests the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and upon a full consideration, reverse the judgment of the Circuit Court as to the §1692e(11) violation and further reverse the order and judgment of the District Court as to any other violation under §1692e(9) §1692e(10) and §1692e(13) and direct that judgment be entered in favor of Petitioner, or remand for further proceedings.

Respectfully submitted,

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